Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1908

JOHN KOWALSKI, JOHN JURISS, FRANK KRAUSE and JOHN McDONALD,

Petitioners,

vs.

LAWRENCE BUTLER, CECIL DAVIS, RON JACKSON, CHARLES JAMES, MONROE JENKINS, JAMES NASH, and ESTATE OF NATHAN NASH, Deceased,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, John Kowalski, John Juriss, Frank Krause and John McDonald, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in this cause.

OPINION BELOW

The opinion and judgment of the Court of Appeals was announced December 29, 1978, rehearing *in banc* was denied March 26, 1979, and the opinion has been reported at 589 F.2d 323. The opinion is reproduced in Appendix A.

JURISDICTION

Rehearing and rehearing *in banc* was denied March 26, 1979. Appendix B. This petition is filed within 90 days thereof. Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

COMPANION PETITION

The respondents have filed a separate petition for writ of certiorari to review a different part of the Court of Appeals judgment. *Lawrence Butler v. Goldblatt Bros.*, No. 78-1889. The present petitioners are not a party to that petition.

QUESTIONS PRESENTED

Whether a police officer may make an arrest only if he has "first hand knowledge" of the facts supporting a belief that the arrestee committed a crime;

Whether, under 42 U.S.C. § 1983, a police officer may be held liable for making an arrest knowing facts which had been supplied to a reliable private security officer by an informant if an element of the offense is corroborated to the police officer by the intended victim;

Whether the reasonableness of the police officer's belief that there was probable cause to arrest in those circumstances should have been submitted to the jury;

Whether, even if the supervisory police officers had no probable cause to direct that an arrest be made, subordinate police officers may be held liable under 42 U.S.C. § 1983 solely for making the arrest under the mistaken order of their supervisor.

STATUTE

42 U.S.C. § 1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

This was a civil rights trial in which the respondents claimed that the petitioners, Chicago Police officers, falsely arrested and imprisoned them in violation of the Federal Civil Rights Act (42 U.S.C. § 1983) and in violation of Illinois common law. At the close of all evidence, the United States District Court directed a verdict in favor of the respondents and against petitioners Commander John McDonald, and Sergeant John Juriss, supervisory police officers. (Instruction 4A, R. item 110.)* In its verdict, the jury found, however, against the respondents and in favor of all the police officers as to the Federal Civil Rights Act claim, and returned a verdict against only the supervisory police officers in the amount of five thousand dollars only on the state common law false arrest and imprisonment claim. (R. item 120.) In addition, the jury found against one of the plaintiffs, Ernest Lewis, and further found in favor of the remaining respondent police officers, John Kowalski and Frank Krause. (R. item 119.) Although the court let stand the verdict against plaintiff Lewis, it entered a judgment N.O.V. against Officers Krause and Kowalski. (R. item 131.)

As to the supervisory police officers, the court directed the verdict because it stated that the police officers could not have reasonably believed that there was probable cause to arrest the respondents. (Tr. 1054-9, 1094-5; opinion of Ct. May 5, 1977, R. item 104.) Judgment notwithstanding the verdict was entered against Officers Krause and Kowalski because they participated in the arrests directed by the supervisory police officers.

* References are to the Court of Appeals Record ("R.") and District Court transcript ("Tr.").

All the respondents were truck drivers employed by Goldblatt Brothers, Inc. Ernest Lewis was a cousin of Jessie Green, another Goldblatt's truck driver.

Another Goldblatt's truck driver was Wayne Young, an undercover agent for the security department of Goldblatt's. Young learned that the respondents and Lewis were planning a plot on the life of one Andre Walker, a member of Goldblatt's security office. Andre Walker was to be prevented from testifying in court against Jessie Green. They were to act against Walker on the day he was to testify. Apart from what was learned from informant Young, Walker received anonymous telephone threats.

The Goldblatt's director of security, Thomas Marsh, went to the local police headquarters of the Chicago Police Department and described the source of the information and details of the murder plot to Sergeant Juriss and Commander McDonald. At that time, however, Marsh did not reveal the identity of the informant Wayne Young, for fear of "blowing his cover," and risking the informant's safety. (Tr. 529-41.) He did tell the officers that the informant was reliable and had supplied accurate information previously. (Tr. 315, 566-7, 766.) Walker, as well, personally related to McDonald the threats he had received. (Tr. 343-4, 357-8.)

McDonald testified that the information given to him by Marsh and Walker was insufficient, in his opinion, to make arrests. However, he arranged an all-day surveillance and protection for Andre Walker on the day he was scheduled to go to court to testify against Jessie Green.

Both McDonald and Juriss testified that on prior occasions the information supplied by Goldblatt's security department had proved to be reliable and arrests and convictions had resulted from the information Goldblatt's had given them. (Tr. 355, 356, 442, 726, 748, 778.)

On the day of Walker's court appearance, police officers followed him from his home to the court. He was accompanied to the courtroom by officers including Sergeant Juriss. Walker testified, and as a result of his testimony in court on that day, Jessie Green was bound over to the Grand Jury.

Ernest Lewis had accompanied his cousin Jessie Green to the courtroom. After Walker testified, he turned and walked back down the center aisle to the rear of the courtroom. Ernest Lewis met him half-way down the aisle, grabbed him by the arm, swung him around, and told him that "Well, that's it for you." Immediately upon his reaching Sergeant Juriss outside the courtroom, Walker related what Lewis had said and done. However, Sergeant Juriss had not seen the incident because he had preceded Walker out of the courtroom.

Commander McDonald then received a telephone call from Sergeant Juriss. Juriss told McDonald about Lewis' threat. Knowing that an informant had uncovered a plot against Walker's life, and hearing that one of the plotters had uttered a threat against Walker just as he finished his testimony in the courtroom, McDonald ordered the arrest of the plotters. (Tr. 332, 772.)

Until that time, the police officers did not know the names of the persons other than Lewis participating in the plot. Sergeant Juriss and Patrol Officers Kowalski

and Krause accompanied the Goldblatt's personnel to the warehouse. As the respondents arrived at the end of their day, each was pointed out by the Goldblatt's security personnel and the police put them under arrest. However, all were later released and none was convicted.

As a result of the courtroom incident, Ernest Lewis was charged with intimidation, but the charges were later stricken with leave to reinstate. In the instant case, the jury returned a verdict of no liability on the part of the police officers for their arrest of Lewis.

REASONS FOR GRANTING THE WRIT

THE OPINION IMPOSES AN UNPRECEDENTED AND IMPROPER BURDEN UPON LAW ENFORCEMENT OFFICERS; IT DOES SO IN CONFLICT WITH DECISIONS OF THIS COURT AND SISTER COURTS OF APPEALS.

A.

The opinion of the Court of Appeals below establishes a new definition of probable cause, a definition which has never appeared in prior cases, which is contrary to decisions of the Supreme Court and which places new restrictions on law enforcement not required by the Constitution. The opinion, at Appendix, page 5a, states that no probable cause exists for the arrests because "the police appellants had *no first hand knowledge of any facts* to support a belief that the six Goldblatt employees were engaged in criminal activity. . . ." Emphasis the court's.

To require "first hand knowledge" before an officer may arrest on probable cause misstates the law. In fact, a sister court of appeals has said the opposite. "There is no requirement that the arresting officer have sufficient firsthand knowledge to constitute probable cause." *Daniels v. United States*, 393 F.2d 359, 361 (D.C. Cir. 1968). When an officer makes an arrest on a victim's report and description, on a police radio report, or indeed upon a warrant, he always acts without first hand knowledge of the facts of the offense but only with information supplied by another. In fact, the essence of probable cause is not certainty that a suspect committed a crime but that reliable information furnishes reason to believe a crime was committed.

Police cannot and should not be omnipresent, and they must necessarily rely on information supplied by others. The Supreme Court has often approved arrests without first hand knowledge of the facts of the offense under standards such as those in *Aguilar v. Texas*, 378 U.S. 108, 114 (1964):

> "[A]n affidavit [for a warrant] may be based on hearsay and need not reflect the direct personal observation of the affiant . . . [T]he magistrate must be informed of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant was 'credible' or his information 'reliable.' "

In *Draper v. United States*, 358 U.S. 327 (1959) and especially in *Jones v. United States*, 362 U.S. 257 (1960) the Supreme Court rejected the position of the court below that probable cause could only be proven by personal observation and could not be established through the eyes of another. In *Jones*, a police officer swore before a magistrate that an unnamed informant had told him where narcotics were stored in an apartment. Further, the officer swore to the conclusion (without stating names and other particulars) that the informant had given reliable information in the past. The Supreme Court held that the magistrate correctly found probable cause to issue a search warrant.

The court in *Jones* rejected the defendant's argument that because the "affidavit claimed *no direct knowledge* of the presence of narcotics in the apartment" (362 U.S. at 368, emphasis added), probable cause was not shown. Mr. Justice Frankfurter, for the court, stated:

> "This affidavit was, it is claimed, insufficient to establish probable cause because it did not set forth

> the affiant's *personal observations* . . . but rested wholly on hearsay. . . . The question here is whether an affidavit which sets out personal observations relating to the existence of cause to search is to be deemed insufficient by virtue of the fact that it sets out not the affiant's observations but those of another. An affidavit is not to be deemed insufficient on that score, so long as a substantial basis for crediting the hearsay is presented." 362 U.S. at 269, emphasis added.

In the present case the petitioner police officers relied on the observation of another as related by Goldblatt's security officers. But the police, despite the second hand nature of the information, had a substantial basis for believing the hearsay. They were in possession of more than an "unilluminating assertion of suspicion," *Spinelli v. United States*, 393 U.S. 410, 414 (1969), but were aware in detail of the "underlying circumstances from which the informer concluded" the respondents plotted to murder Walker, *Ibid.* at 416.

The hearsay in *Spinelli* did not support probable cause because it was silent as to how the informant concluded gambling was present, how he obtained the information, or whether it was a result of the informant's personal observation. *Id.* All those elements, in contrast, were in possession of the present police petitioners. Goldblatt's security officers supplied not merely the conclusion of a plot, but underlying details, such as the number and general identity of the conspirators (Goldblatt truck drivers frequenting a certain club), the reason for the plot (to keep Walker from testifying), that money had changed hands in furtherance of the plan, the location of the meetings, the identity of the victim, and even the day it was to occur (Green and Walker's court date). All of these things were observed personally

by the Goldblatt informant. (Walker, himself, related personally to the police officers the threats he had received by telephone.)

Thus, the informant, himself, did not report this directly to the police, but the facts were relayed through the Goldblatt security officers. But probable cause is not tainted because the informant did not appear in person before the police officers. This issue was disposed of in *Jones*. There the arrestee made the identical argument, which the Supreme Court stated and answered as follows:

> "Petitioner argues that the warrant was defective because Didone's [the police officer's] informants were not produced, because his affidavit did not even state their names, and Didone did not undertake and swear to the results of his own independent investigation of the claims made by his informants. If the objections raised were that Didone had misrepresented to the Commissioner his basis for seeking a warrant, these matters might be relevant. Such a charge is not made. All we are here asked to decide is whether the Commissioner acted properly, not whether Didone did. We have decided that, as hearsay alone does not render an affidavit insufficient, the Commissioner need not have required the informants or their affidavits to be produced, or that Didone have personally made inquiries about the apartment, so long as there was a substantial basis for crediting the hearsay." 362 U.S. at 271-2.

In making a judgment whether probable cause existed, Commander McDonald and the other police appellants were in the same position as the magistrate in *Jones*. They could rely on a report of the informant's statements. The Court of Appeals' opinion emphasized that the police appellants were not acquainted with the informant, Young, and did not know his name. Yet that

was the situation in *Jones*. The identity is not as important as the details of facts constituting the "substantial basis" for crediting the informant's statement. Here, as in *Jones*, there were sufficient facts presented to make it permissible to rely on statements of an unnamed informant. *Jones* has not been overruled, and was cited with approval in *Aguilar v. Texas*, 378 U.S. 108, 114 (1964).

Under *Jones*, the police petitioners need not have awaited further corroboration before making arrests. Yet, they prudently acted to protect Walker during his court testimony and did not make an arrest until they became aware of still another step in the plot, Lewis' courtroom confrontation of Walker. Lewis' behavior was almost precisely as predicted, coming as a result of Walker's in-court testimony, on the stated date, and by the chief instigator.

The court's opinion does not consider the Lewis confrontation to be corroborative of the plot, not because the facts do not fit the plot, and not because the confrontation did not occur, but because no police officer actually witnessed the confrontation. Walker reported Lewis' threat immediately and to the first police officer he saw. To give no credence to Walker's report, merely because the police did not observe it, is contrary to the proposition that police officers may validly arrest in reliance on complaints furnished by victims or information supplied by bystanders.

The Seventh Circuit's dismissal of Walker's report of Lewis' threat is inconsistent with the acknowledgement that Lewis was arrested with probable cause. In contrast to the other plaintiffs, the district judge did not direct a verdict in favor of Lewis. The jury's verdict, in fact, was against Lewis, and Lewis did not appeal the jury's finding that the police, who did not actually

observe the confrontation, had probable cause to arrest him. Therefore there is no logic in the opinion's conclusion that Lewis' behavior did not corroborate the plot, merely because the police did not personally observe what he did.

The court's opinion, Appendix, page 4a, states that police must, but did not here, "undertake an independent investigation to corroborate the details" of the informant's report. But, whether knowledge of it was obtained actively or passively, the Lewis confrontation and threat was corroboration of the plot. There is no need to actively and independently investigate; the only requirement is that the "additional information *acquired by* the arresting officers must in some sense be corroborative of the informer's tip." *Whiteley v. Warden*, 401 U.S. 560, 567 (1971).

The court's opinion now makes personal observation of crime—first hand knowledge—a prerequisite to making an arrest. If the opinion is not reversed, arrests based upon information supplied by reliable informants, bystanders and victims will subject officers not only to damage suits, but may also jeopardize criminal prosecutions and effective law enforcement.

B.

The Court of Appeals affirmed the District Court's taking from the jury the question of the existence of probable cause. But probable cause is uniquely a question for the jury, and only in the most egregious circumstances can the court rule an arrest invalid as a matter of law. The constitutional propriety of an arrest depends on whether the officers had *reasonably* trustworthy information to warrant a *prudent* man to believe an offense had been committed. *Beck v. Ohio*, 379

U.S. 89, 91 (1964). The opinion below ignores the essential function of a jury in determining what is reasonable under the circumstances.

C.

Patrol Officers Kowalski and Krause, of course, had no first hand knowledge of the offense since they only made the arrest under orders from supervisors. But if they must be held liable for not having first hand knowledge, then any officer can be held liable for executing a warrant valid on its face but issued erroneously or for making an arrest on a radio report which turns out later to be based on false information.

Petitioners Kowalski and Krause had no reason to question the instructions of their sergeant and commander. The subordinate officers should not be required to engage in a searching interrogation of their supervisors to learn the sources and reliability of information supporting the supervisors' order. Yet, the opinion below fosters such a result. The courts below permitted the jury to be overruled and held as a matter of law that subordinate officers could not trust the judgment of their superiors who had issued orders apparently valid on their face. The result of this holding is that officers now must question and will hesitate to obey warrants, radio reports and orders issued by superiors until the superior officers furnish sufficient information to permit patrol officers to make an independent judgment as to the existence of probable cause.

This holding conflicts with the Supreme Court's statement in *Whiteley v. Warden*, 401 U.S. 560, 568 (1971), approving reliance on instructions from fellow officers. The *Whiteley* arrest was made on the basis of a radio report. The Court stated:

> "We do not, of course, question that the Laramie Police were entitled to act on the strength of the radio bulletin. Certainly police officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause."

In *Whiteley*, as here, the information supplied by the supervisory officer was held to be insufficient in a *criminal* proceeding to support probable cause. But that question is different, as the court indicated in *Whiteley*, from the question whether a subordinate officer may be held *civilly* liable for carrying out a superior's order which is valid on its face but issued in error.

CONCLUSION

The petition for certiorari should be granted, and, after hearing, the judgment below should be reversed and, as to Juriss and Krause, remanded for a new trial.

Respectfully submitted,

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June 25, 1979

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 77-2043, 77-2044, 77-2074 and 77-2149

LAWRENCE BUTLER, CECIL DAVIS, RON JACKSON, CHARLES JAMES, MONROE JENKINS, ERNEST LEWIS, JAMES NASH, and ESTATE OF NATHAN NASH, Deceased,

Plaintiffs-Appellees,

v.

GOLDBLATT BROS., INC., THOMAS MARSH, DENNIS MCFARLAND, ANDRE WALKER, WAYNE YOUNG, and ELMER GERL, JOHN KOWALSKI, JOHN JURISS, FRANK KRAUSE, and JOHN MCDONALD,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 74 C 3000—**Bernard M. Decker**, *Judge.*

ARGUED MAY 30, 1978—DECIDED DECEMBER 29, 1978

Before PELL, BAUER, *Circuit Judges,* and HARPER, *Senior District Judge.**

BAUER, *Circuit Judge.* This appeal involves a civil rights claim under 42 U.S.C. § 1983 and a pendent state

* The Hon. Roy W. Harper, United States District Court for the Eastern and Western Districts of Missouri, is sitting by designation.

law claim for false arrest and imprisonment. The action was brought by two groups of plaintiffs: (1) six employees of Goldblatt Brothers, Inc., namely, Lawrence Butler, Cecil Davis, Ron Jackson, Charles James, Monroe Jenkins, James Nash and Nathan Nash[1] [hereinafter six Goldblatt employees]; and (2) Ernest Lewis, a friend of the six employees. The named defendants in the action also consisted of two groups: (1) four Chicago policemen, namely, John McDonald, John Juriss, John Kowalski and Frank Krause [hereinafter police appellants]; and (2) Goldblatt Brothers, Inc., together with four members of its security department, namely, Wayne Young, Thomas Marsh, Andre Walker and Dennis McFarland [hereinafter Goldblatt's].

The major issues on appeal arise from a series of events that began when Wayne Young, an "undercover" agent for the Goldblatt security department, reported that the plaintiff-appellees were plotting to murder a Goldblatt security officer named Andre Walker. As described by Young, the plot called for Walker to be killed on the day he was scheduled to testify against Jessie Green, a former Goldblatt employee who had been fired for allegedly stealing goods that belonged to the store.

Upon receiving Young's report, Walker and the director of Goldblatt security, Thomas Marsh, contacted the police appellants and informed them of Young's allegations. Although Marsh and Walker did not disclose either Young's identity or the names of the alleged conspirators, the law enforcement officers arranged for Walker to receive police protection on the day of his scheduled court appearance.

[1] Nathan Nash died shortly after the law suit was filed, and his estate was substituted in the proceedings. The defendant-appellants now argue that Nash's claim for false arrest and imprisonment abated with his death. However, we agree with the district court that false arrest and imprisonment involves a direct physical restraint on the person, and thus survives under Illinois law as an action "to recover damages for an injury to the person." Ill. Rev. Stat. Ch. 3, § 339. See *Beard v. Robinson*, 563 F.2d 331 (7th Cir. 1977).

On that date, Walker was accompanied by a team of police officers to a Chicago criminal court, where he testified against Green. Immediately thereafter, Walker informed the officers that he had been threatened by Lewis in the courtroom. Specifically, Walker charged that Lewis had grabbed him by the arm and warned, "Well, that's it for you." Although the alleged threat was not witnessed by any of the policemen, Commander McDonald ordered the arrests of Lewis and the six Goldblatt employees. The seven men were then detained for periods ranging from three to fifteen hours, only to be released when McDonald determined that the evidence was insufficient to charge them.

In the subsequent action for damages brought by Lewis and the six employees, the plaintiffs' amended complaint asserted two grounds for recovery: (1) a claim under 42 U.S.C. § 1983 for the allegedly unconstitutional arrests (Count I); and (2) a claim under Illinois common law for false arrest and imprisonment (Count III). As to the six employees, the trial judge directed a verdict against police officers McDonald and Juriss on both counts, while the jury returned a verdict against Goldblatt's on the state law claim alone. In addition, the trial judge granted Butler and Jenkins judgment notwithstanding the verdict on both counts against Officers Krause and Kowalski. As to the plaintiff Lewis, the jury returned a verdict against Goldblatt's on the § 1983 claim, but found no liability on the part of the policemen under either count.

To resolve the issues presented on appeal, we must examine the various findings of liability against the defendant-appellants. To this end, we may begin with the state and federal claims against the police appellants arising from the arrests of the six Goldblatt employees. Since the arrests were made without warrants, their validity under both Illinois common law[2] and the United

[2] It seems clear that under Illinois common law an action for false arrest and imprisonment will lie if the arrest is made without probable cause. See *Middleton v. The Kroger Co.*, 30 Ill. App. 3d 295 (1976); *Odorizzi v. A.O. Smith Corporation*, 452 F.2d 229, 231 (7th Cir. 1971). The Illinois courts have held that probable cause exists when

(Footnote continued on following page)

States Constitution depends on whether, at the moment they were made,

> "the officers had probable cause to make [them]—whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [Goldblatt employees] had committed or [were] committing an offense."

Beck v. Ohio, 379 U.S. 89, 91 (1964). On the facts of this case, such a determination of probable cause must hinge on the weight to be given the information that was supplied by the informant Young. Accordingly, we must examine the "underlying circumstances from which the officers concluded that *the informant was credible or his information reliable.*" *McCray v. Illinois*, 386 U.S. 300, 304 (1967) (emphasis supplied); *Aguilar v. Texas*, 378 U.S. 108, 114 (1964).

As to the credibility of the informant, it is quite apparent that the police officers had no reasonable basis for believing Young to be a reliable informant. The record discloses that the police appellants did not have any prior experience with Young, and indeed did not even know that he was the individual who was supplying the information.

By the same token, it is equally apparent that the officers did not have reasonable grounds for believing the information to be reliable, since they did not undertake an independent investigation to corroborate the details of the accusations. See *Spinelli v. United States*, 393 U.S. 410, 413, 417 (1969); *Draper v. United States*, 358 U.S. 307 (1959). On this point, the police

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[2] *continued*

"the facts and circumstances within the arresting officer's knowledge and of which he had reasonable and trustworthy information, are sufficient in themselves to warrant a man of reasonable caution in believing that an offense had been committed, and that the person arrested is guilty." *People v. Peak*, 29 Ill.2d 343, 348; *People v. Mills*, 98 Ill. App.2d 248, 254 (1968).

appellants argue that the substance of the allegations was corroborated by the threatening remarks that Lewis allegedly made to Walker in the courtroom. But this argument ignores a crucial point, namely, that the alleged confrontation between Lewis and Walker was not witnessed by any of the law enforcement officers. Indeed, the police appellants had *no first hand knowledge of any facts* to support a belief that the six Goldblatt employees were engaged in criminal activity at the time they arrested them. Accordingly, we have no difficulty in concluding that a reasonable man could not find that the arrests were based on probable cause.

By the same reasoning, we must also conclude that the so-called "good faith" defense under 42 U.S.C. § 1983 is not available to the police officers in this case. In *Pierson v. Ray*, 386 U.S. 547 (1967), the Supreme Court held that if police officers "reasonably believed in good faith that the arrest was constitutional, then a verdict for the officers would follow even though the arrest was in fact unconstitutional." *Id.* at 557. Thus, the crucial question is whether the law enforcement officers "acted in good faith with a reasonable belief in the constitutionality of their conduct," *Brubaker v. King*, 505 F.2d 534, 537 (7th Cir. 1974); and, as noted above, we find no basis for a "reasonable belief" that the warrantless arrests of the six employees were based on probable cause and hence constitutional. It is our conclusion, therefore, that the directed verdict against Commander McDonald and Sergeant Juriss, and the judgment notwithstanding the verdict against Officers Krause and Kowalski must be affirmed.

We turn now to the question of Goldblatt's liability to the six employees under the state law claim of false arrest and imprisonment. It is well settled in Illinois that "giving information to police in itself is insufficient to constitute participation in an arrest." *Odorizzi v. A.O. Smith Corporation*, 452 F.2d 229 (1971). Thus, in *Morris v. Faulkner*, 46 Ill. App. 3d 625 (1977), the court declared that a private party who furnishes inaccurate information to law enforcement officers could not be held liable for false arrest on that ground alone:

> "The complaint merely alleges that [the defendants] called Sheriff Faulkner and made 'false accusations' that plaintiffs would cause trouble. Thus, at most, liability of [the defendants] could only be based upon having conveyed information of an erroneous opinion to the proper authority. With this information, Faulkner was free to take whatever action, if any, he chose. Therefore his acts, whether lawful or unlawful, could not give rise to liability for [the defendants] *since they had not directed or procured those acts.*"

Id. at 620 (emphasis supplied). Similarly, in *Middleton v. The Kroger Co.*, 30 Ill. App. 3d 295 (1976), the court found no liability for false arrest and imprisonment where the defendants "did not at any time sign a complaint against the plaintiff, did not request the police officer to arrest the plaintiff, and did not detain the plaintiff." *Id.* at 298.

In the case at hand, the jury returned a verdict against Goldblatt's on the six employees' state law claim of false arrest. The record discloses, however, that Goldblatt's did not in any way detain the employees, nor did it sign a complaint against them or direct the officers to arrest them. Rather, the evidence suggests that Goldblatt's did nothing more than give information to the police, who were then free to decide for themselves whether or not the employees should be arrested. It is our view that this evidence is not sufficient under Illinois law to support a verdict of liability against Goldblatt's, and, for this reason, we must set aside the judgment of the jury on the state law claim of false arrest and imprisonment.

These same considerations also compel the conclusion that Goldblatt's "participation" in the arrest of Lewis is not actionable under 42 U.S.C. § 1983. The Supreme Court has made it clear that two elements are necessary for recovery of damages under § 1983:

> "First, the plaintiff must prove that the defendant has deprived him of a right secured by the 'Constitution and laws' of the United States. Second, The plaintiff must show that the defendant deprived him of this Constitutional right 'under color of any statute, ordinance, regulation, custom or usage, of any State or Territory.' This second element requires that the plaintiff show that the defendant acted 'under color of law.' "

Adickes v. Kress & Co., 398 U.S. 144, 150, (1970). Furthermore, in construing the "under color of law" requirement, the Court has held that

> "[p]rivate persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute. To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the state or its agents."

United States v. Price, 383 U.S. 787, 794 (1966).

In applying these principles to the instant case, we are again unable to find in the record any significant evidence to suggest that Goldblatt's did anything more than supply information to police officers who then acted on their own initiative in arresting Lewis; and we decline to hold that the mere act of furnishing information to law enforcement officers constitutes "joint activity with state officials in the *prohibited action*" (that is, the allegedly unconstitutional arrest of Lewis). Accordingly, we must also set aside the jury's verdict against Goldblatt's on Lewis' claim for relief under § 1983.

We note, finally, that the district court considered the nature of the verdicts in determining the award of attorneys' fees under 42 U.S.C. § 1988, and it specified that $15,000 of the $25,000 award was to be paid by Goldblatt's. We must therefore remand the case for a redetermination of attorneys' fees consistent with the views expressed in this opinion.

We have examined the appellants' other arguments and find them to be without merit. Accordingly, the judgment of the district court is

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

Corrected on April 19, 1979

In the

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

March 26, 1979

Before

Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. ROY W. HARPER, *Senior District Judge**

Nos. 77-2043, 77-2044, 77-2074 and 77-2149

LAWRENCE BUTLER, CECIL DAVIS, RON JACKSON, CHARLES JAMES, MONROE JENKINS, ERNEST LEWIS, JAMES NASH, and ESTATE OF NATHAN NASH, Deceased,

Plaintiffs-Appellees,

v.

GOLDBLATT BROS., INC., THOMAS MARSH, DENNIS MCFARLAND, ANDRE WALKER, WAYNE YOUNG, and ELMER GERL, JOHN KOWALSKI, JOHN JURISS, FRANK KRAUSE, and JOHN MCDONALD,

Defendants-Appellants.

On Petition for Rehearing
and Suggestion for
Rehearing In Banc

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* The Hon. Roy W. Harper, Senior District Judge of the United States District Court for Eastern and Western Districts of Missouri, is sitting by designation.

ORDER

On consideration of the petitions for rehearing and suggestions for rehearing *in banc* filed in the above-entitled cause by the plaintiffs-appellees and the police defendants-appellants, a vote of the active members of the Court was requested and a majority of the active members of the Court have voted to deny a rehearing *in banc*.** All of the judges on the original panel have voted to deny the petition for rehearing.

The plaintiffs-appellees' petition for rehearing notes that the panel's opinion appears to ignore the fact that Walker (a Goldblatt's employee) signed a complaint against Lewis after allegedly receiving a threat from him. In our view, however, this fact is not enough to establish that Goldblatt's acted in concert with state officials and is therefore liable under § 1983. Moreover, we are not persuaded that the arrest of Lewis was made without probable cause.

Accordingly, IT IS ORDERED that the aforesaid petitions for rehearing be, and the same are hereby, DENIED.

** Chief Judge Fairchild and Judge Swygert voted to grant rehearing *in banc* regarding plaintiffs-appellees' petition.